

BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeal of:

) Hearing Examiner File:

) **MUP-12-016(W)**

)

BRUCE STRUTHERS

)

from a SEPA decision issued by the Director,
Department of Planning and Development

) RESPONDENTS' REPLY RE: MOTION
TO DISMISS

)

)

I. INTRODUCTION

Appellant appears to regard the DPD decision that is under appeal as a "permission to proceed" whose appeal can be a vehicle for Appellant to raise any objections he may have to the Meadowbrook Pond Detention Facility Dredging and Improvements Project (the "Project"). That is not the case. The decision under appeal is a DPD decision imposing substantive SEPA conditions on the Project. Whether an EIS should have been prepared, whether a shoreline substantial development permit should have been required, and whether the Project complies with various non-SEPA requirements are all beyond the permissible scope of this appeal.

To obtain his requested relief, Appellant must show that DPD erred by failing to exercise its substantive SEPA authority to mitigate adverse environmental impacts of the proposal. Frankly, Appellant has provided no detailed explanation regarding the adverse impacts that he

1 asserts will result from the proposal. In any event, however, the City lacks substantive SEPA
2 authority to impose the conditions or grant the relief requested by Appellant. Of particular
3 importance, the City lacks authority to deny the Project under SEPA where no EIS has been
4 prepared. Indeed, Appellant essentially concedes the lack of SEPA substantive authority to
5 support his requested relief by failing to address virtually every legal argument contained in
6 Respondents' Motion to Dismiss. Given this failure, the appeal is utterly without merit and the
7 Examiner should promptly dismiss it.

8 **II. ARGUMENT**

9 **A. It is too late for Appellant to challenge the DNS and request an EIS.**

10 In his Response to Respondents' Motion to Dismiss ("Response"), Appellant again
11 requests that an EIS be prepared.¹ However, as set forth in Respondents' Motion to Dismiss,
12 Appellant's failure to timely appeal the March 8, 2012, DNS precludes such a claim, and
13 Appellant's Response never addresses or rebuts the well-established law on this score.

14 In light of the foregoing, the large portions of Appellant's Response that challenge the
15 DNS are irrelevant and must be disregarded. In the section of his Response entitled "Under-
16 assessment of environmental impact," Appellant suggests that the proposal at issue in this case
17 did not change from the proposal that was the subject of the previous DNS that SPU issued and
18 then withdrew in 2011.² The purported legal significance of this allegation is unclear, but the
19 allegation is incorrect as a factual matter. The proposal that was the subject of the previous DNS
20 included a work item to "[m]odify the existing diversion structure for the overflow pipe at the
21 upstream end of the project to improve the Thornton Creek flowpath into the structure"; the work

22 ¹ See Response, p. 7.

23 ² *Id.*, p. 5.

1 included removing the north corner of the concrete structure.³ That work item was removed
2 from the proposal that is at issue in this case.⁴

3 Appellant's Response then alleges that SPU erred in its evaluation of the impacts of the
4 proposal prior to issuing the March 8, 2012, DNS; suggests that the proposed work really would
5 change the flow characteristics of the existing upstream inlet to the high flow bypass; and
6 requests preparation of an EIS.⁵ However, the propriety of the March 8, 2012, DNS is now
7 beyond challenge. Similarly, the sections of Appellant's Response entitled "Expert advice
8 ignored" and "A SEPA responsible official's duty" deal with whether SPU properly issued a
9 DNS.⁶ Such discussion is irrelevant at this point.

10 **B. There is no substantive SEPA authority to support Appellant's requested**
11 **relief.**

12 Incredibly, Appellant's Response suggests that Respondents' Motion to Dismiss, by
13 focusing on the issue of substantive SEPA conditioning, "completely misses the point of the
14 appeal."⁷ On the contrary, the DPD decision that is under appeal is a decision imposing
15 conditions pursuant to substantive SEPA authority. There is no question that much of
16 Appellant's requested relief – and the *only* portion of Appellant's requested relief that could be
17 timely and within the Examiner's jurisdiction – consists of requesting that the Examiner impose
18 various conditions that DPD declined to impose (or otherwise grant certain relief desired by

19 ³ See Environmental Checklist, August 29, 2011, pp. 4-5 (on file with Examiner in case no. W-11-008).

20 ⁴ See Environmental Checklist, February 29, 2012, pp. 3-5, Declaration of Greg Stevens ("Stevens Decl."), Ex. A.
21 The current proposal simply calls for adding a second trash rack at the inlet and related work. *Id.*, p. 5. The
22 checklist for the current proposal clearly specifies that "[t]he project would not alter any flow control features
23 affecting Thornton Creek or the Pond, including the high flow bypass pipe inlet. . ." *Id.*, p. 3.

⁵ See Response, pp. 5-7.

⁶ *Id.*, pp. 7-9. Under the SEPA regulations, the "responsible official" makes the threshold determination – here, a
DNS. SMC 25.05.788, SMC 25.05.797. The DPD decision under appeal, by contrast, deals with substantive SEPA
conditioning.

⁷ See Response, p. 2.

1 Appellant, regardless of whether one characterizes that relief as a “condition”) utilizing the
2 City’s substantive SEPA authority.

3 To prevail, Appellant must therefore show that DPD erred by failing to exercise its
4 substantive SEPA authority to mitigate adverse environmental impacts of the proposal. As a
5 threshold matter, it bears emphasis that Appellant has (even at this late date) provided scant
6 detail regarding the adverse impacts that he asserts will result from the proposal. A primary
7 concern of Appellant appears to be that the existing Meadowbrook Pond facility has deficiencies
8 that the proposal will not address – or that the benefits of the improvements will not be worth the
9 cost.⁸ This is not an issue of mitigation for adverse impacts under SEPA. Similarly, Appellant
10 has ideas about how the effectiveness of the facility allegedly could be improved (which SPU
11 has not proposed to implement).⁹ By contrast, Appellant says little about the adverse
12 environmental impacts that he believes would result from the proposal. Appellant’s Response (at
13 p. 3) states that “Meadowbrook Outfall is where the significant environmental and flow effects
14 of the project are experienced,” but Appellant offers little detail as to what those effects would
15 be.

16 However, even if the proposal would have adverse environmental impacts, the City can
17 exercise substantive SEPA authority to mitigate those impacts only in compliance with the strict
18 limitations of SEPA and its implementing regulations. Respondents’ Motion to Dismiss fully
19 explained the reasons why there is no substantive SEPA authority for imposition of the
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21 ⁸ See Response, p. 3 (“No evidence presented by Seattle Public Utilities explains how the design deficiencies of the
22 Meadowbrook Detention Pond are addressed by the proposed ‘improvements’.”); *see also* Appellant’s Response to
23 Respondents’ Motion to Quash, p. 7 (raising issue of whether proposed modifications to facility will achieve SPU’s
design goals and whether there will be measurable benefits from improvements costing “millions of dollars”).

⁹ See Response, p. 8 (contending that effectiveness of pond would be increased if upstream inlet to high flow bypass
were blocked).

1 conditions/granting of the relief requested by Appellant.¹⁰ However, Appellant's Response
2 utterly fails to rebut those points.

3 **1. The City may deny a project under its substantive SEPA authority**
4 **only if an EIS has been prepared.**

5 Appellant concedes that his requests to prohibit all tree removal and vegetation
6 disturbance, prohibit the proposed work at the inlet to the high flow bypass, prohibit the
7 widening of the asphalt pathway to that inlet, prohibit modification of the forebay trash rack, and
8 prohibit construction of maintenance roads to the forebay essentially constitute a request to deny
9 the Project. Indeed, Appellant fails to identify a single element of the Project (other than
10 mitigation-type elements such as habitat improvements) that he would allow to go forward.

11 As set forth in Respondents' Motion to Dismiss, SEPA authorizes denial of a project
12 under the City's substantive SEPA authority only when an EIS has been prepared -- which has
13 not occurred in this case, and cannot occur now due to Appellant's failure to timely appeal the
14 DNS.¹¹ Appellant does not dispute that this is the law. Moreover, Appellant never addresses or
15 rebuts Respondents' point that the City's SEPA policies do not support the foregoing requests.
16 Thus, the foregoing requests for relief (whether or not they are regarded as "conditions") must be
17 dismissed as a matter of law.¹²

18 ¹⁰ See Motion to Dismiss, pp. 6-18.

19 ¹¹ See SMC 25.05.665.A.2 ("The decisionmaker may deny a proposed project if an environmental impact statement
20 has been prepared and if reasonable mitigating measures are insufficient to mitigate significant, adverse impacts
21 identified in the environmental impact statement."); see also RCW 43.21C.060 ("In order to deny a proposal under
this chapter, an agency must find that: (1) The proposal would result in significant adverse impacts identified in a
final or supplemental environmental impact statement prepared under this chapter; and (2) reasonable mitigation
measures are insufficient to mitigate the identified impact.").

22 ¹² These requests correspond to items 3 through 6 in the list on page 7 of Respondents' Motion to Dismiss.
23 Similarly, Appellant never addresses or rebuts that the City lacks substantive SEPA authority to prohibit the
proposed work at the upstream inlet to the high flow bypass where there is no SEPA environmental document that
identifies a specific, adverse environmental impact resulting from the proposed work at that inlet to the high flow
bypass. See Motion to Dismiss, pp. 10-12.

1 **2. The City may not use its substantive SEPA authority to address pre-**
2 **existing conditions.**

3 Appellant also never addresses or rebuts that Appellant's requests to "daylight" the high
4 flow bypass pipeline and remove the concrete foundation of the abandoned Lake City Sewage
5 Treatment Plant address preexisting conditions and as such cannot be mandated under SEPA
6 substantive authority. Thus, these requests must also be dismissed as a matter of law.¹³

7 **3. Appellant fails to create an issue of fact that his requested monitoring**
8 **conditions are justified.**

9 Appellant's Response does address Respondents' contentions regarding Appellant's
10 request for conditions imposing various monitoring requirements. However, Appellant fails to
11 create any issue of material fact suggesting that the City has substantive SEPA authority to
12 impose those conditions.

13 First, with respect to Appellant's request for enhanced instrumentation and monitoring of
14 the pond, including flow rate monitors and temperature gauges at all inlets and outlets,
15 Respondents' Motion to Dismiss pointed out -- based on a declaration by the lead designer of the
16 Project (a professional engineer) -- that such a condition would serve no purpose in light of the
17 nature of the facility and thus cannot be imposed under substantive SEPA authority.¹⁴

18 Appellant's only response is two sentences in his Response in which the Appellant (a layperson)
19 gives his *own* characterization of the functioning of various elements depicted on a schematic
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22 ¹³ These requests correspond to items 1 and 2 in the list on page 7 of Respondents' Motion to Dismiss. Appellant
23 also never addresses or rebuts that the City lacks substantive SEPA authority to deny certain elements of the Project
because of their alleged inconsistency with the proposed, later Confluence Project (item 9 in the foregoing list).

¹⁴ See Motion to Dismiss, pp. 15-16, and Declaration of Mike Hrachovec.

1 diagram.¹⁵ This is scarcely sufficient to question the conclusions of a professional engineer, who
2 has personally designed the Project, regarding the functioning of the facility.

3 Second, with respect to Appellant's request for imposition of the monitoring
4 requirements that would apply to a Combined Sewer Overflow (CSO) under the citywide CSO
5 Long Term Control Plan, Respondents' Motion to Dismiss pointed out – based on a declaration
6 by the City's CSO Reduction Program Manager (a civil engineer) – that Meadowbrook Pond and
7 the high flow bypass pipeline that carries stormwater to Lake Washington simply do not
8 constitute a CSO.¹⁶

9 As the City's CSO Reduction Program Manager explained, a CSO arises where sewer
10 pipes are designed to carry both sanitary sewage and stormwater, and the high flow bypass
11 pipeline associated with Meadowbrook Pond is only designed to carry stormwater and thus is not
12 a combined sewer.¹⁷ Appellant states in his Response that "the Sand Point Tunnel, now used as
13 a high flow bypass pipeline, was designed and constructed to carry treated sewage and storm
14 water from the Lake City Sewage Treatment Plant."¹⁸ However, as Appellant admits, the Lake
15 City Sewage Treatment Plant is long defunct (witness Appellant's request that the foundation of
16 the old plant be removed from the pond). Regardless of the original purpose of any facilities
17 related to that plant, it is undisputed that the high flow bypass pipeline associated with
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21 ¹⁵ See Response, p. 7.

22 ¹⁶ See Motion to Dismiss, pp. 14-15, and Declaration of Andrew Lee ("Lee Decl.").

23 ¹⁷ See Lee Decl., ¶¶ 3, 5. Mr. Lee's description of what constitutes a CSO is thus entirely consistent with the SEPA environmental checklist for an unrelated project that Appellant quotes in his Response. See Response, p. 11.

¹⁸ See Response, p. 11.

1 Meadowbrook Pond is currently designed to carry only stormwater.¹⁹ Appellant's suggestion
2 that a CSO exists based on a long-terminated prior use is absurd on its face.

3 Finally, Appellant's extensive discussion of the Phase I Municipal Stormwater General
4 Permit issued by the State Department of Ecology is completely irrelevant.²⁰ The Phase I permit
5 applies to "municipal *separate storm sewer* systems" (emphasis added), so the permit by
6 definition does not deal with the combined sanitary sewage/stormwater situation involved in a
7 CSO.²¹ In any event, the Phase I permit does not dictate specific monitoring requirements for
8 Meadowbrook Pond and compliance with the requirements of the permit is not at issue in this
9 appeal in any event.

10 In sum, there is no SEPA substantive authority that would allow the Examiner to impose
11 the conditions/relief sought by Appellant. Thus, the Examiner must dismiss all of Appellant's
12 SEPA claims as a matter of law.

13 **C. No shoreline substantial development permit was required and Appellant's**
14 **remaining argument regarding the "project boundaries" lacks any merit.**

15 Having essentially conceded the core issue in this case, Appellant's Response goes on to
16 address a number of other matters. However, Appellant's remaining contentions are also without
17 merit.

18 In his Response, Appellant again asserts that the proposal will create impacts at the outfall
19 from which water from the high flow bypass pipeline is discharged into Lake Washington, such that

20 ¹⁹ See Lee Decl., ¶ 5. As Mr. Lee points out, even if sanitary sewage somehow reached the pond by accident and
21 thence proceeded through the pipeline, that would not make the pipeline a CSO. *Id.*, ¶ 6.

22 ²⁰ See Response at pp. 9-11.

23 ²¹ Note that, in the block quote at the bottom of page 9 of his Response, Appellant omits the word "storm" between
"separate" and "sewer", which misleadingly creates the impression that the Phase I permit might apply to something
else. The correct version of the quoted language can be seen on page 9 of the PCHB's decision, available on the
Environmental Hearings Office website at <http://www.eho.wa.gov/searchdocuments/2008%20archive/pchb%2007-021,07-026,07-027,07-028,07-029,07-030,07-037%20phase%20i%20final.pdf>

1 the proposal is regulated under the City's Shoreline Master Program (SMC ch. 23.60).²² However,
2 as set forth in Respondents' Motion to Dismiss, the Examiner does not have jurisdiction over
3 Appellant's claim that a shoreline substantial development permit is required for the project.²³
4 Moreover, even if that issue were within the Examiner's jurisdiction, Appellant's claim is contrary
5 to applicable law, because the proposal involves no work or activity constituting "substantial
6 development" within the "shorelines."²⁴ Appellant's Response does not address or rebut any of the
7 foregoing points or cite any legal authority in support of his position that a shoreline substantial
8 development permit is required.

9 Appellant's Response nonetheless contends that SPU "did not accurately represent the
10 project boundaries" to DPD and that, "[since] DPD was provided incomplete material information
11 on the project boundaries and the environmental effects of the completed project," the Hearing
12 Examiner "has authority to repeal."²⁵ Appellant suggests that DPD was misled such that DPD did
13 not understand that water leaving the pond and entering the high flow bypass would ultimately
14 reach Lake Washington, because the "project boundaries" were not stated to include the outfall
15 where such water enters Lake Washington.²⁶ However, to the extent that Appellant suggests that
16 there is some issue related to the "project boundaries" that would call for the Examiner to deny the
17 project under SEPA, Appellant cites no legal authority for that proposition, and such an argument
18 fundamentally misunderstands both the legal framework of SEPA review and the facts of the SEPA
19 review in this case.

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21 ²² See Response, p. 4.

22 ²³ See Motion to Dismiss, pp. 21-22.

23 ²⁴ *Id.*, pp. 20- 21. It is undisputed that the proposal does not involve work on the shoreline of Lake Washington,
only in the vicinity of Meadowbrook Pond and the adjacent Thornton Creek. The mean annual flow of Thornton
Creek is below the level that would bring it within the "shorelines." See Motion to Dismiss, p. 20 n.75.

²⁵ See Response, p. 3.

²⁶ *Id.*

1 The key conceptual unit for SEPA purposes is the “proposal.” Agencies use the
2 environmental checklist to assist in making threshold determinations on proposals.²⁷ The
3 responsible official reviews the checklist and additional information and determines whether the
4 proposal would have a probable significant adverse environmental impact requiring an EIS.²⁸

5 In this case, as part of the Project, SPU does not propose to do any work at the Lake
6 Washington outfall, only work in the vicinity of Meadowbrook Pond.²⁹ However, the
7 environmental checklist in this case fully describes the entire system into which the Meadowbrook
8 Pond facility fits – including all of the facilities by which water from the high flow bypass pipeline
9 reaches the outfall at Lake Washington – so that the impacts of the proposed work could be
10 adequately evaluated.³⁰ Indeed, the checklist specifically discusses the fact that “[b]ecause the
11 Pond’s live capacity would increase, the amount of water that flows to Lake Washington via the
12 Pond overflow structure and the high flow bypass pipe (rather than via Thornton Creek) would
13 increase slightly” and then goes on to discuss hydraulic modeling performed to determine the
14 existence of resulting impacts.³¹ (It bears emphasis that the discussion in the checklist clearly
15 supports a conclusion of minimal impact.) Thus, the checklist unquestionably presented a complete
16 picture and did not, by omitting information, prevent a proper evaluation of environmental
17 impacts.³²

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19 ²⁷ SMC 25.05.315.A.

20 ²⁸ SMC 25.05.330.

21 ²⁹ See Environmental Checklist, February 29, 2012, pp. 3-5, Stevens Decl., Ex. A.

22 ³⁰ *Id.*, p. 4.

23 ³¹ *Id.*, p. 12. This discussion relates to the water that enters the high flow bypass via the overflow pipe at the east side of the Pond – a different matter than water entering the upstream inlet to the high flow bypass from Thornton Creek (as noted above, the checklist made clear that the proposed work at the upstream inlet to the bypass would not change the flow characteristics of that inlet).

³² Of course, if Appellant wished more detailed discussion of impacts than was contained in the checklist, he should have timely appealed the DNS in an attempt to trigger an EIS, but he did not do so.

1 In sum, DPD was not presented with an incomplete picture that could or would have misled
2 DPD into not considering whether the Project would have adverse environmental impacts on Lake
3 Washington that should be addressed through an exercise of substantive SEPA authority. Given the
4 contents of the environmental checklist, there is simply no support for Appellant's suggestion that
5 DPD would not have understood (or did not understand) that water from the high flow bypass
6 pipeline would reach Lake Washington. Rather, Appellant simply disagrees with DPD's decision
7 not to exercise its substantive SEPA authority to address adverse impacts that Appellant believes
8 would result from the Project. However, given that (as discussed above), the City lacks substantive
9 SEPA authority to impose the conditions or grant the relief sought by the Appellant, DPD's
10 substantive SEPA decision must be affirmed.³³

11 **D. The Examiner lacks jurisdiction to consider Appellant's claims related to SMC**
12 **chapters 25.09, 25.11, and 25.06.**

13 Appellant's statement of appeal raised various claims regarding compliance with SMC
14 chapters 25.09, 25.11, and 25.06. As set forth in Respondents' Motion to Dismiss, the Examiner
15 lacks jurisdiction over those claims.³⁴ Appellant's Response does not address or rebut any of
16 Respondents' jurisdictional arguments, so the Examiner must dismiss those claims.

17 **III. CONCLUSION**

18 Appellant lost his chance to trigger an EIS when he failed to timely appeal the DNS.
19 Moreover, the City lacks substantive SEPA authority to impose the conditions or grant the relief
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22 ³³ Appellant suggests that the project plans failed to comply with DPD Client Assistance Memo 103, which deals
23 with the requirements for site plans for MUPs. *See* Response, p. 4. However, there is no requirement that a MUP
site plan cover the entire geographic area that potentially could be impacted by a project for purposes of SEPA
review.

³⁴ *See* Motion to Dismiss, pp. 18-20, 22-23.

1 requested by Appellant. All of Appellant's other claims are beyond the Examiner's jurisdiction.

2 Thus, Respondents request that the Examiner dismiss this appeal as a matter of law.

3 Respectfully submitted this 17th day of September, 2012.

4 PETER S. HOLMES
5 Seattle City Attorney

6 By: s/Jeffrey S. Weber, WSBA #24496
7 Assistant City Attorney
8 *Attorneys for Respondents*
9 *Seattle Public Utilities & Department of*
10 *Planning & Development*

CERTIFICATE OF SERVICE

I certify that on this date, I electronically filed a copy of Respondents' Reply Re: Motion to Dismiss with the Seattle Hearing Examiner using its e-filing system.

I also certify that on this date, a copy of the same document was sent to the following party listed below in the manner indicated:

R. Bruce Struthers
10514 Riviera Place NE
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(X) U.S. First Class Mail, postage prepaid
(X) Email: bruce.struthers@comcast.net

the foregoing being the last known address of the above-named party.

Dated this 17th day of September, 2012, at Seattle, Washington.


ROSIE LEE HAILEY